

Department of the Navy, DoD

§ 725.9

duty, reserve, retired, or former Marines should be requested from Director, Defense Finance and Accounting Service, Kansas City Center (Code G), Kansas City, MO 64197-0001.

(3) *Interviews, depositions, and testimony (where the United States is not, and is reasonably not expected to become, a party)*—(i) *Factual matters.* DON policy favors disclosure of factual matters when disclosure does not violate the criteria stated in this section. Distinguishing between factual matters and expert or opinion matters (where DON policy favors non-disclosure) requires careful analysis. Opinion matters are defined at § 725.4(c).

(ii) *Expert, opinion, or policy matters.* Such matters are to be determined, under the delegation in § 725.6, by the cognizant Deputy Assistant Judge Advocate General or by General Counsel. General considerations to identify expert or opinion testimony are in § 725.4(c). DON personnel shall not provide, with or without compensation, opinion or expert testimony concerning official information, subjects, or activities, except on behalf of the United States or a party represented by the Department of Justice. Upon a showing by the requester of exceptional need or unique circumstances, and that the anticipated testimony will not be adverse to the interests of the DOD or the United States, the appropriate DON official designated in § 725.6, may grant, in writing, special authorization for DON personnel to appear and testify at no expense to the United States. In determining whether exceptional need or unique circumstances exist, the determining official should consider whether such expert or opinion testimony is available to the requester from any other source. The burden of demonstrating such unavailability, if any, is solely upon the requester.

(iii) *Visits and views (where the United States is not, and is reasonably not expected to become, a party).* Such disclosures are normally factual in nature and should not be accompanied by interviews of personnel unless separately requested and granted. The authority of the commanding officer of the activity, ship, or unit at issue is not limited by this part. Accordingly, he or she may prescribe appropriate

conditions as to time, place, and circumstances (including proper restrictions on photography).

(iv) *Non-DOD information.* A request for disclosure under this part, particularly through the testimony of a witness, may involve both official information and non-DOD information (e.g., in the case of a person who has acquired additional and separate knowledge or expertise wholly apart from Government employment). Determining whether or not official information is at issue is within the purview of the determining authority, not the requester. A requester's contention that only non-DOD information is at issue is not dispositive. The requester must still comply with this instruction to support that contention. If non-DOD information is at issue in whole or in part, the determining authority shall so state in the written determination described in § 725.9. He or she shall make no other determination regarding that non-DOD information.

§ 725.9 Action to grant or deny a request.

(a) The process of determining whether to grant or deny a request is not an adversary proceeding. This part provides guidance for the operation of DON only and is not intended to, does not, and may not be relied upon to, create any right or benefit, substantive or procedural, enforceable at law against the United States, DOD, or DON.

(b) 32 CFR part 97 and this part apply to testimony by former naval personnel and former civilian employees of DON. A proper request must be made, under § 725.7, to obtain testimony by former personnel regarding official DOD information. However, this part is not intended to place unreasonable restraints upon the post-employment conduct of such personnel. Accordingly, requests for expert or opinion testimony by such personnel will normally be granted unless that testimony would constitute a violation of the U.S. Code (e.g., 18 U.S.C. 201 *et seq.*), conflict with pertinent regulations (e.g., Secretary of the Navy Instruction 5370.2H), or disclose properly classified or privileged information.

(c) A determination to grant or deny should be made as expeditiously as possible to provide the requester and the court with the matter at issue or with a statement of the reasons for denial. The decisional period should not exceed 10 working days from receipt of a complete request complying with the requirements of § 725.7, absent exceptional or particularly difficult circumstances. The requester should also be informed promptly of the referral of any portion of the request to another authority for determination.

(d) Except as provided in § 725.7(d), a determination to grant or deny shall be in writing.

(e) The determination letter should respond solely to the specific disclosures requested, stating a specific determination on each particular request. When a request is denied in whole or in part, a statement of the reasons for denial should be provided to fully inform a court of the reasons underlying the determination if it is challenged.

(f) A copy of any denial, in whole or in part, of a request, should be forwarded to the cognizant Deputy Assistant Judge Advocate General or the Associate General Counsel (Litigation), as appropriate. Such notification is likewise appropriate when the litigation request has been treated under 5 U.S.C. 552, 552a and § 725.5(f). Telephonic notification is particularly appropriate where a judicial challenge or contempt action is anticipated.

(g) In cases in which a subpoena has been received and the requester refuses to pay fees or otherwise comply with the guidance and requirements imposed by this part, or if the determining authority declines to make some or all of the subpoenaed information available, or if the determining authority has had insufficient time to complete its determination as to how to respond to the request, the determining authority must promptly notify the General Litigation Division of the Office of the Judge Advocate General or the Navy Litigation Office of the Office of the General Counsel, which offices will determine, in consultation with the Department of Justice, the appropriate response to be made to the tribunal which issued the subpoena. Because the

Federal Rules of Civil Procedure require that some objections to subpoenas must be made either within 10 days of service of the subpoena or on or before the time for compliance, whichever first occurs, and because this will require consultation with the Department of Justice, timely notice is essential.

§ 725.10 Response to requests or demands in conflict with this instruction.

(a) Except as otherwise provided in this paragraph, DON personnel, including former military personnel and civilian employees, shall not produce, disclose, release, comment upon, or testify concerning any official DOD information in response to a litigation request or demand without prior written approval of the appropriate DON official designated in § 725.6. If a request has been made, and granted, in whole or in part, per 32 CFR part 97 and this part, DON personnel may only produce, disclose, release, comment upon, or testify concerning those matters specified in the request and properly approved by the determining authority designated in § 725.6. See *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

(b) If, after DON personnel have received a litigation request or demand and have in turn notified the appropriate determining authority described in § 725.6, a response to the request or demand is required before instructions from the responsible official have been received, the responsible authority designated in § 725.6 shall notify the Deputy Assistant Judge Advocate General or Associate General Counsel (Litigation) who has cognizance over the matter. That official will furnish the requester, the court, or other authority that the request or demand is being reviewed in accordance with this part and seek a stay of the request or demand pending a final determination.

(c) If a court of competent jurisdiction or other appropriate authority declines to stay the effect of the request or demand in response to action taken under § 725.10(b), or if such court or other authority orders that the request or demand must be complied with, notwithstanding the final decision of the